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Published in:
European Property Law Journal

DOI:
[10.1515/eplj-2015-0011](https://doi.org/10.1515/eplj-2015-0011)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2015

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Li, L. (2015). The design of a four-phase participation framework in expropriation and its adoption in China. *European Property Law Journal*, 4(3), 253–274. <https://doi.org/10.1515/eplj-2015-0011>

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The design of a four-phase participation framework in expropriation and its adoption in China

DOI 10.1515/eplj-2015-0011

Abstract: In China, the lack of participation of the affected people is obvious throughout the whole expropriation process. This primarily concerns the expropriation of rural collective land. The deficiency in the legislation on expropriation and the urgent need for an effective participation of the affected people in practice require new perspectives in the design of a well-governed expropriation procedure. In this research, based on the current international documents on good governance of land tenure, a four-phase participation framework in land expropriation is proposed. Although certain elements in this framework have been included in the expropriation concerning state-owned land, the four-phase participation is still absent. Through introducing the key elements of this international framework, a full and effective participation in expropriation is expected to be established in China.

Key Words: international participation framework, expropriation, China, state-owned land, collective land

1. Introduction

Land use in China is overall regulated by a land use control system (*tudi yongtu guanzhi* 土地用途管制). To some extent, the land system in China is the most special and most complicated land system in the world.¹ In the Chinese context, all the rural land is owned by the collective, and most of the farmland in the collective is contracted to individual households/farmers (members of the collec-

¹ Ba, Shusong. 2013. “Chengxiang er’yuan fen’ge shi zhongguo xianxing tudi zhidu de hexin zhengjie” (The urban-rural divide is the crux of the current land system in China), Xinhuanet, 19 November, http://news.xinhuanet.com/fortune/2013-11/19/c_125728232.htm. Accessed 28 February 2015.

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tive). This is the so-called communal land tenure.² In accordance with the property-rights theory, the collective as the land owner should have the right to possess, use, seek profit from and dispose of the land.³ However, since the establishment of the expropriation system of collective land in 1986 in the first Land Administration Law (LAL) (Article 2), the right to seek profits and the disposition right to the collective land are extremely restricted. First, in accordance with the 1982 Constitution (Article 10) and the new 1998 LAL (Article 8), all the land in cities is owned by the state; land in the rural and suburban areas is collectively owned except for those belonging to the state. Judging from the literal sense of this sentence, it is easy to take the nationalization of land as a premise of the urbanization of land. This general understanding led to an almost unlimited scope of expropriation of collective land in practice.⁴ Second, according to the 2004 amendment to the Constitution, the requirement for a public interest and the payment of compensation for expropriation are introduced. However, there are no further rules on the definition of this public interest and the calculation of the compensation. Even in the LAL, the basic law on the management of land, a clear definition of the public interest is still absent. Also, the compensation is still quite low as it is based on the original purposes of the land expropriated.⁵ Most importantly, in terms of the procedure for the expropriation of collective land, the participation of affected farmers is greatly limited.⁶

Regarding the lack of legal safeguards against expropriation in China, analyses and specific recommendations have been given in several research. Through reviewing the institutional and legal structure governing land expropriation and its socioeconomic impacts, Ding concludes that land expropriation in China has been used as a main tool for promoting urbanization and local economy, at the expense of rural development and farmers' land rights.⁷ A radical and fundamental change such as property rights to rural collective land is required, instead of piecemeal reforms in institutions involved in land expropriation. The solution proposed by Washburn is the separation of a transferable land development right from the rural collective land ownership and granting it to individual farmers.⁸ Wörner also gives recommendations to improve the legal framework, based on the

² Bruce 1998, 3.

³ Alsen 1996, 24.

⁴ Zhong n.d.

⁵ ADB 2011, 17; Ding 2007, 8.

⁶ ADB 2011, 22–23 and 26.

⁷ Ding 2007.

⁸ Washburn 2011, 71–124.

human rights norms in the international community.⁹ All of them highlight the importance of strengthening farmers' land rights to future improvements in China's land expropriation system. However, a thorough examination of the expropriation procedure and the way to improve the procedure through a full participation of affected people have not yet been discussed. They are the spotlight of this research. First, a four-phase participation framework is proposed based on the recent influential international documents on good governance of land expropriation. Then, under the bifurcated land system, expropriations concerning both state-owned land and rural collective land in China are examined, with an emphasis on the expropriation procedure for the collective land. As the four-phase participation framework combines the best practices from both developed and developing countries, a proper adoption of it in China is believed to contribute to the establishment of a well-governed expropriation system in both law and practice.

2. Lack of participation in China's land expropriation law and practice

The procedure of expropriation in China is provided by Article 46–49 of the 1998 LAL and Article 20, 25, 26 of the 1998 Regulation on the Implementation of the Land Administration Law (RILAL). Under the current system, only after the expropriation plan is publicized, affected farmers may play a part in the procedure. In order to improve the overall procedure, Decision of the State Council on Deepening the Reform and Tightening Land Management (2004 Decision of the State Council) and the following Guidelines of the Ministry of Land and Resources (MLR) on Improving the Land Compensation and Resettlement System are issued in 2004, followed by a series of ministerial rules and regulatory documents aimed at strengthening farmers' participation before an expropriation plan is approved. However, these participatory requirements are not fulfilled in local areas, as shown in the Annual Report on China's Rule of Law (*zhongguo fazhi fazhan baogao* 中国法治发展报告) in 2011, in which a survey on farmers' land rights in today's China contains a number of expropriation cases.¹⁰ Based on the investigated expropriation cases, in 28.8 percent of all cases, farmers did not get any notice in advance. In 58.2 percent of all cases, farmers' own opinions on the amount of compensation were not asked

⁹ Wörner 2014, 1–22.

¹⁰ Prosterman et al. 2011.

beforehand. Another report provided by the Economic System and Management Institute of the National Development and Reform Committee (NDRC) on farmers who lost land due to expropriation in 2013¹¹ shows that, up to 68 percent of affected farmers did not attend any meetings organized by local governments, and their opinions on expropriation and compensation were not solicited either.

Lack of participation of the affected people in the expropriation process is thus a critical issue in China, in addition to a vague public interest and a low compensation standard. Under the circumstances, innovations in improving farmers' participation in expropriations in local practice and central policies are noteworthy. These local innovations focus on the diversity of compensation, such as the compensation with retained land (*liuyongdi* 留用地) to the collective involved in Lingshui County in Hainan Province.¹² In accordance with the Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform announced in November 2013 (the 2013 Decision of the CCCPC), the collective construction land that planned for profit-oriented use can be transferred directly on the market, provided that it is in line with local land use planning. In practice, a direct transfer of such collective land starts emerging.¹³ More notably, a pilot project concerning a comprehensive reform in the current expropriation system in 33 counties and districts is being conducted by the central government.¹⁴ However, there are still two downsides of these innovations. First, the implementation of these new policies is limited. In the near future, it is only limited to the pilot areas. Second, there is no significant improvement in specific expropriation procedures. An overall participation framework for the affected people in the expropriation

11 Guojia fagaiwei jingji tizhi yu guanli yanjiusuo. 2013. "Beizhengdi nongmin manyi ma?" (Are farmers whose land have been expropriated satisfied), *Caixin Zhongguogaige*, 29 August.

12 Li 2014.

13 Zou, Zhao and Mason 2014, 9114–23.

14 In order to better protect Chinese farmers' collective land rights, 33 counties and districts across China were chosen by the State Council as pilot areas for further reforming the property-rights system of collective land on 31 December, 2014. It mainly involves the market transfer of certain collective construction land, reforms in the current land expropriation system (a better definition of public purpose, a transparent procedure and diversified safeguards for landless farmers) and the transfer of rural homestead. Regarding the conflict between the pilot plan and the current law on the transfer of collective land, the suspension of a number of provisions in the Land Administration Law (Article 43, 44, 47, 62 and 63) and the Law on the Administration of the Urban Real Estate (Article 9) in selected counties and districts has been approved by the Standing Committee of the National People's Congress (NPC) at the end of February 2015. According to the approved plan, this pilot is only limited to the 33 counties and districts, which will end at the end of 2017. Xinhua. 2015. "Lawmakers Mull China's Pilot Rural Land Use Reform", 26 February, http://www.npc.gov.cn/englishnpc/news/Legislation/2015-02/26/content_1905681.htm. Accessed 20 April 2015.

process is absent in China. Inspiration from the international governance structure for land expropriation could lead to a better solution.

3. An international framework for participation in land expropriation

The recent and the most influential documents concerning the governance of land issues, and land expropriation in particular, are the Voluntary Guidelines of FAO on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security in 2012 (usually named VGGT), the Land Governance Assessment Framework of World Bank in 2012 (usually named LGAF), and the Working Paper I of GLTN (Global Land Tool Network)—Evictions, Acquisition, Expropriation and Compensation: Practices and Selected Case Studies in 2013. Earlier documents include the Land Tenure Studies of FAO No.9—Good Governance in Land Tenure and Administration in 2007 and the Land Tenure Studies of FAO No.10—the Compulsory Acquisition of Land and Compensation in 2009. The latter provides a relatively inclusive guide regarding the procedure of land expropriation.

With the aim of promoting responsible governance of tenure of land and other resources, five general principles and the ten principles of implementation are proposed in the VGGT.¹⁵ As shown by these principles, a responsible governance of land is a holistic and interconnected system, and the fair treatment of the people affected is the objective. This is also confirmed by the FAO land tenure study No. 9.¹⁶ A good framework for land governance is indispensable, yet how to assess the effectiveness of this interlinked and complicated system is also important. The LGAF can be regarded as a proper tool for this assessment. Following the methodology used by the Public Expenditure and Financial Accountability (PEFA) assessment tool, 21 Land Governance Indicators (LGIs) covering five thematic areas of good land governance are created.¹⁷ On the one hand, based on the requirement for the recognition and protection of private land rights and the restriction and supervision over relevant public powers, fairness to the private landholders is guaranteed (LGI 14). On the other hand, as shown by the indicators, good land governance should also be cost-effective and efficient (LGI 13), which means good governance

¹⁵ FAO 2012, 3–5.

¹⁶ FAO 2007, 6.

¹⁷ Deininger, Selod and Burns 2012, 39 and 40–45.

of land tenure shall build upon a proper balance between efficiency and fairness. This also applies to the governance of land expropriation.

Under this interconnected land governance framework, more elements shall be added into the expropriation system. Most importantly, from the perspective of the affected people, this new understanding of expropriation signifies a broader participation framework. In the VGGT of FAO (Section 16 Expropriation and compensation), the LGAF of World Bank (LGI-13 and LGI-14) and especially the Working Paper I of the GLTN,¹⁸ the elements in this newly defined expropriation have been mentioned and discussed. Overall, at least four phases of participation can be identified in specific projects: the participation prior to the approval of an expropriation decision, the participation prior to the approval of compensation and resettlement plans, the participation in the implementation of the expropriation plan, and the participation of affected people in monitoring the use of the expropriated land. Although these different phases of participation have been stated somewhere in the international documents, the FAO land tenure study No. 10 in particular, none of them has made a clear distinction between these four phases.

First, regarding the decision-making of a proposed expropriation, usually it is controlled by the government and on the basis of a public purpose. With the aim of limiting the expropriation power of the government, the public purpose shall be clearly defined in law.¹⁹ Moreover, as the determination of public purposes is usually controlled by governments, measures such as a Social Impact Assessment (SIA) can restrict this expropriation power.²⁰ This is especially important for countries where there is no clear definition of public purposes in law, or an open-ended article is provided for the definition. Meanwhile, even if the land is acquired for a public purpose, alternative approaches to achieving this purpose can be discovered through an effective participation of affected parties. Attempts to acquire the land in question through voluntary transactions should be made by the acquiring authority before exercising the expropriation power.²¹ Furthermore, if the voluntary purchase failed, issues involving an effective and equal participation in this decision-making, the access to information, people who can participate in the procedure and forms of participation should be clarified beforehand.²² Firstly, in accordance with the VGGT, existing power imbalances between different parties should be taken into consideration. In particular, a fair representative

18 van Eerd and Banerjee 2013, 58–61 and 78–83.

19 FAO 2009, 10–11.

20 FAO 2009, 19–20.

21 *Ibid.*, 54.

22 Hoops 2014.

mechanism shall be established based on the free will of the affected rights-holders.²³ Secondly, in order to facilitate an effective participation in the decision-making, the acquiring authority is encouraged or even obliged to provide related information in a timely manner.²⁴ Thirdly, regarding the range of participants, anyone likely to be affected should be identified, and properly informed and consulted at all stages.²⁵ As required by the FAO study No. 10, the participation of individuals and groups in related decision-making should be active, free, effective, meaningful and informed. Last but not least, the most crucial issue in this phase concerns the forms of participation, which directly determines the result of the participation. Again, an impact assessment in the planning phase of proposed projects, including an SIA, is strongly promoted in the FAO study No. 10.

Second, in addition to the requirement of a public purpose, another prerequisite for expropriation in most national laws is fair compensation. This concerns the participation in the second phase of expropriation. Section 16.3 of the VGGT requires that the state shall ensure a fair valuation and prompt compensation in accordance with national law.²⁶ As fair compensation generally means the market value of the desired land, the valuation of land is thus crucial to the amount of final compensation. In the FAO study No. 10, certain assistance is encouraged so that owners and occupants can participate effectively in negotiations on valuation and compensation.²⁷ Whether the valuation is undertaken by the acquiring authority or by an independent appraisal agency, the affected rights-holders should be allowed to determine the value of their land through hiring their own valuers. This cost should be covered by the acquiring authority.²⁸ In the later VGGT, as a part of land administration systems, the establishment of a fair and timely valuation system for expropriation is regarded as a responsibility of national states. Instead of focusing on the assistance for the affected people, it highlights the transparency, quality and training of certain national standards for valuation.²⁹ However, this does not preclude the participation of the affected people. If they do not trust the valuation result, chances to apply for an administrative and/or judicial review of such decisions should be provided.³⁰ Regarding the form of compensation, if it is possible, alternative land shall be used as an

²³ FAO 2012, 5 and 16.

²⁴ FAO 2009, 20.

²⁵ FAO 2012, 27–28.

²⁶ FAO 2012, 28.

²⁷ FAO 2009, 17.

²⁸ *Ibid.*, 25.

²⁹ FAO 2012, 30–31.

³⁰ *Ibid.*, 10.

appropriate compensation,³¹ which helps to reduce objections to the process and reduce the total costs.³²

Third, even after the whole expropriation plan is approved by competent authorities, the participation of affected people is still significant. Here the participation mainly concerns the supervision over the competent authority in implementing the agreed compensation and resettlement. In many Constitutions or special legislations, it is only mentioned that the payment of compensation should be prompt. There is no (clear) provision for the period in which payment is to be made.³³ In order to ensure that the whole compensation can be paid on time, the legislation should require that only after the entire compensation or a substantial percentage of it has been received by the affected people can the acquiring authority take possession of the land. In the case of delay in payment, people concerned are entitled to claim for the overdue money and the interests on it.³⁴ The LGAF suggests that most expropriated land owners receive compensation within one year.³⁵ The legislation may also need to provide the basis on which compensation is allocated between landowners and the real land users, if they are not the same.³⁶ Moreover, people who have to vacate their land and/or houses should be given enough time to clear out the land or move to the resettlement housing. For farmers who rely on agriculture for a living in particular, a certain period of time should be set aside to recoup their investments in land.³⁷

Fourth, as one part of a land governance system, an appropriate monitoring mechanism is indispensable for improving the governance structure of land tenure.³⁸ Specific to the monitoring regarding land expropriation, one primary objective is to safeguard the legal rights and interests of the affected people. Another important goal is to curb and reduce corruption in governing land use.³⁹ The establishment of a specialized court or a tribunal that mainly deals with land disputes can contribute to the protection of the affected people's rights, and ensure the fairness of an expropriation process.⁴⁰ In addition to the judicial protection, the creation of a special monitoring agency for violations including

31 Ibid., 28.

32 FAO 2009, 38–39.

33 Ibid., 26.

34 Ibid., 27.

35 Deininger, Selod and Burns 2012, 44.

36 FAO 2009, 32.

37 Ibid., 44.

38 FAO 2012, 5.

39 Ibid., 8–9.

40 Ibid., 33.

corruption concerning expropriation also helps to protect this fairness. Regarding the monitoring of the land use after the expropriation is completed, usually this is the responsibility of certain government agencies. However, when such an agency is not available or it does not really work in practice, the monitoring from private parties such as NGOs or even social media may play an important role.⁴¹ The affected people can also help to supervise the use of the expropriated land. More importantly, in the event that the land is not used in accordance with the purpose of the initial plan, or the land is not needed due to the changes of plans afterwards, the original landholders should have a priority to reclaim the land.⁴² The establishment of a special monitoring agency and the public participation in the monitoring of land use can ensure the use efficiency of the expropriated land at the same time. According to the LGAF of World Bank, the time-efficiency of expropriation processes can be guaranteed if the majority of land that has been expropriated in the past 3 years has been transferred to its destined use (LGI 13 ii).⁴³ This is, however, not the usual case in countries like China, where the management of land use is dominated by the need of industrialization and economic development.⁴⁴ As analysed below, a new governance structure for land expropriation is urgently needed in China.

4. Adoption of the four-phase participation framework in China

The design of a land governance system is deeply influenced by the development strategy of specific countries. In order to get rid of poverty and promote industrialization, land rights and interests of Chinese farmers were sacrificed for the development of urban areas.⁴⁵ On the basis of a bifurcated land system, the use and transfer of rural land use rights are greatly restricted, especially by the disordered land expropriation system.⁴⁶ According to the 2013 Decision of the CCCPC, a major strategic judgment that development is still the key to solving all the problems in China was proposed. Meanwhile, the development here does not merely focus on the increase of efficiency ensured by an overarching control of governments, but a

⁴¹ FAO 2009, 50–51; Bong et al. 2012; Arpit 2012, 48–52.

⁴² FAO 2012, 28.

⁴³ Deininger, Selod and Burns 2012, 43.

⁴⁴ Ding 2007, 3–5.

⁴⁵ Dang 2005, 31–35.

⁴⁶ Chen 2013.

fair and more market-oriented development.⁴⁷ This new development strategy will influence the reform of expropriation system, as land expropriation is regarded as the main way to acquire land to develop local economy since the Tax Sharing Reform (*fenshuizhi* 分税制) in 1994.⁴⁸ Currently, the expropriation process is overall dominated by the acquiring authority—local governments, thus it is mainly an administrative procedure. The role of the judiciary in expropriation is rather limited.⁴⁹ What is worse is that the affected farmers do not have rights to oppose the expropriation plan. With a vague definition of public interests, the necessity of expropriation is barely questioned.⁵⁰

4.1 Participation prior to the expropriation decision

To some extent, there are two types of land expropriation in China. The first one is the widely acknowledged “expropriation for public interests”, which is regulated by Article 10 of the Constitution. However, the second type of expropriation is not purely for public interests. In accordance with the Law on the Administration of the Urban Real Estate (Article 9) and the 1998 LAL (Article 43 and 63), investors cannot directly negotiate and buy the collective construction land from the collective. Only after the desired land is expropriated and converted into state-owned land may it be granted to investors by local governments. This can be named “expropriation for private interests under the name of public interests”. Although it is hard to measure the proportion of each type of expropriation, the rapid urbanization and the recently exposed “Ghost Town” (*guicheng* 鬼城) in an increasing number of local areas show that the percentage of the second type is huge.⁵¹ One may argue that the land expropriation for urbanization is for public interests, yet the unrealistic pursuit of urban expansion and the resulting abuse of expropriation power is definitely not for the public good.

In accordance with the international framework, anyone that will be affected is entitled to participate in the planning of expropriation projects. As long as the parties that are likely to be affected can prove that there are alternative and

⁴⁷ According to the Decision, an appropriate handling of the relationship between government and market is the core issue of the economic reform. On the one hand, market should play a decisive role in allocating resources; on the other hand, functions of the government should be improved to promote further economic development.

⁴⁸ Loo and Chow 2006, 215–237.

⁴⁹ ADB 2011, 31; Wörner 2014, 15.

⁵⁰ Ding 2007, 7–8; ADB 2011, 22; Washburn 2011, 81–82; Wörner 2014, 4–5.

⁵¹ Li and Fan 2013.

practical ways to realize the proposed project, the desired land should not be expropriated. This provides an opportunity for affected people to challenge the public purpose claimed by the acquiring authority. However, not all the parties involved are capable of conducting a comprehensive survey and thus propose convincing proofs as to the impracticability of the project. In this case, the affected people may hire certain experts and get reimbursement from the government if they can succeed in halting the expropriation. A more pragmatic solution is the design of an SIA. Experiences from the new land acquisition act of India, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (LARR) in 2013 and its amendment in 2015, are valuable.⁵²

In developed countries such as the Netherlands, spatial planning and especially local zoning plans play a key role in determining the public purpose. To some extent, the public purpose required by expropriation is secured by an active and effective participation of affected people in the making and modification of zoning plan.⁵³ Different from the Netherlands, the planning system in China is fairly complicated. In general, there are three types of plans in China – socio-economic development plans, national spatial plans (land use plans), and urban and rural plans. In accordance with the 1998 LAL, the overall land use plan shall be regarded as the basis for making and modifying other related plans (Article 22). However, this overall land use plan is not legally clarified and protected.⁵⁴ More notably, as a basic principle of an effective planning, public participation is not fully legalized in Chinese law on planning. In addition to few participatory rules in the Urban and Rural Planning Law (Article 18 and 22), there are no such rules in other planning laws. According to the plan of the MLR, the making of a law on national land use planning cannot be realized in the near future,⁵⁵ not to mention the establishment of a strict and highly participatory planning system.

In order to ensure the public purpose of land expropriation, apart from the making of a more participatory land use planning, the Chinese government

52 Available at: <http://www.prsindia.org/billtrack/the-land-acquisition-rehabilitation-and-resettlement-bill-2011-1978/>, and <http://www.prsindia.org/billtrack/the-right-to-fair-compensation-and-transparency-in-land-acquisition-rehabilitation-and-resettlement-amendment-bill-2015-3649/>.

53 Verstappen 2014, 11.

54 Dong, Zuoji. 2013. “Tudi liyong guihua jidai lifa baozhang” (An urgent need for legislation concerning land use planning), 15 May, http://www.gtzyb.com/shiwucuooshi/20130515_38785.shtml. Accessed 1 June 2014; MLIT (Ministry of Land, Infrastructure, Transport and Tourism, Japan). “An Overview of Spatial Policy in Asian and European Countries—China”, http://www.mlit.go.jp/kokudokeikaku/international/spw/general/china/index_e.html. Accessed 1 June 2014.

55 Ji, Ruikun. 2013. “Tudi guanlifa xiuding zaigibu: zhengdi zhidu gaige rengshi zhongdian” (Restart of the revision of the Land Administration Law), 13 November, http://www.21so.com/HTML/21cbhnews/2013/11-13-266997_2.html. Accessed 1 September 2014.

should also consider introducing an SIA at the beginning of expropriation projects. Public purposes which can justify expropriations should be clearly enumerated in the law. Regarding the attempt of purchasing the desired land before the land expropriation, it is still unattainable under the current legal system as the collective land can only be transferred to investors after it is expropriated and turned into state-owned land. Local pilots concerning the direct transfer or the market trading of certain collective construction land by the collective may turn a new page.

4.2 Participation prior to the approval of compensation and resettlement plans

Participation of the affected people in the making of compensation and resettlement plan in China is also limited in both law and practice. According to the Notice of the MLR on Further Improving the Management of Land Expropriation in 2010 (the 2010 Notice of the MLR), in order to shorten the implementation time of the expropriation project, under certain conditions, the compensation and resettlement plan made and announced after the approval of the expropriation plan can be implemented together with the approved expropriation plan. There is no need for another approval for the compensation and resettlement plan. These conditions include: announcement of the expropriation plan, confirmation of the information received by affected collectives and farmers, and a hearing (the first hearing)⁵⁶ for objections to the proposed expropriation plan have been finished. Besides, in accordance with the Measures for Announcement of Land Expropriations (2010 Amendment) of the MLR, the affected people are only allowed to apply for a hearing (the second hearing) regarding the later compensation and resettlement plan, instead of the initial expropriation plan. In essence, the first procedure can better secure the participation of affected people from the beginning of an expropriation process. The second procedure mainly applies to the situation in which no chances were provided for the affected people to challenge the compensation and resettlement standard before the expropriation plan is submitted for approval. Take these provisions literally, the central government does not intend to provide two chances of hearing for the affected people. Furthermore, even if the affected people may challenge the expropriation decision in the first hearing,

⁵⁶ As it is a hearing for the expropriation plan before the plan is submitted for approval, I name it the first hearing in specific expropriation projects. The hearing for the compensation and resettlement plan made after the initial expropriation plan is approved is thus named as “the second hearing”.

it rarely happens in practice. The implementation of the second hearing is not satisfactory either.⁵⁷

The second issue concerns the determination of compensation and the valuation of the expropriated land. In accordance with the international framework, the compensation should be based on a market land price and the affected people may hire an independent appraisal agency themselves if necessary. However, this is not applicable to China. In the Notice of the MLR on the Formulation of a Unified Annual Output Value and an Integrated Land Price within Districts in Land Expropriation in 2005 (2005 Notice of the MLR), a unified annual output value of agricultural land (*tongyi nianchanzhi biao zhun* 统一年产值标准) or an integrated land price within districts (*qupian zonghe di jia* 区片综合地价) are required to be made and announced in local areas. According to the Provisions on the Hearings in Respect of Land and Resources of the MLR in 2004, a hearing must be organized in the case of formulating or modifying the regional compensation standards (Article 12). Besides, measures that can guarantee full and prompt compensation are introduced in the 2010 Notice of the MLR. For instance, when a new construction project is submitted for pre-examination, the approval authority shall make sure that full compensation has been included in the budget estimate. A diversified resettlement system, including resettlement with alternative farmland, resettlement with retained land and providing social securities for landless farmers, is also proposed. The affected farmers shall be resettled with alternative farmland first if such land is available (the 2010 Notice of the MLR). Compared to the first phase, affected people are endowed with more opportunities to participate here. However, in accordance with the ladder of citizen participation theory of Arnstein, the participation in this phase is tokenism at best, instead of real participation.⁵⁸ First, in accordance with the 2005 Notice of the MLR, the compensation is still not based on the market value of the land concerned. Second, the government's preference for the time efficiency of the expropriation process over a fair procedure is clear. Even for these chances for hearing provided by the central documents, no detailed rules are available to put them into practice.

57 According to the China Land and Resources News, the proportion of expropriation projects that have been heard before implementation is relatively low. In all the submitted expropriation plans for approval of certain provinces, more than 90% of landless farmers abandoned their rights to a hearing. This may be partly attributed to farmers' low awareness of the hearing for expropriation, while more importantly, there is no proper procedure for them to attend the hearing. Sometimes the affected farmers were not told their rights to request for a hearing. To make matters even worse, they were forced to sign a proof of waiving their rights to be heard. Yang, Yingqi. 2014. "Xierongting erfei yanerdaoling" ("Listening", instead of "deceiving oneself"), 22 April, http://www.gtzyb.com/pinglun/20140422_62540.shtml. Accessed 24 October 2014.

58 Arnstein 1969, 216–224.

4.3 Participation in the implementation of the expropriation plan

Apart from the focus on the overall efficiency of expropriation projects, measures aimed at protecting the private rights in the implementation of the expropriation plan are available in relevant laws and policies. For instance, without a full payment of the compensation to the affected party, the acquiring authority cannot take possession of the land (2004 Decision of the State Council). Payment of various expenses for land expropriation should be made in full within 3 months starting from the date of approval of the compensation and resettlement plan (1998 RILAL, Article 25). Besides, funds earmarked for compensation and resettlement must and can only be used for the designated purpose (1998 RILAL, Article 26). Provincial governments shall guide the distribution of the compensation within the collective (2010 Notice of the MLR). The collective whose (part of) land is expropriated shall publish the balance of the compensation and accept supervision by its members (1998 LAL, Article 49). However, there are no clear rules on the time for the affected farmers to vacate their land after receiving the compensation and resettlement subsidies. It is only mentioned that in the event that the affected farmers do not vacate the land within time limits, the acquiring authority can force farmers to hand over the land. If the farmers refuse, the authority may apply for a mandatory enforcement to the court (1998 RILAL, Article 45). Meanwhile, although it seems that the existing rules can guarantee full and prompt compensation, it is difficult for the affected people to find and apply these rules as they are from different laws, regulations and central documents.

One more important issue is the availability of judicial review of the administrative decisions involved in land expropriation. According to the Law on the Mediation and Arbitration of Rural Land Contracting Disputes, disputes generated by expropriation can only be settled through administrative reconsideration or litigation (Article 2). However, both of them are not well applied in practice.⁵⁹ In order to protect the litigious right of the affected people in expropriation, the newly amended Administrative Procedure Law (APL) in 2014 further confirms that if the affected people object to the expropriation decision and the compensation decision, or the authority fails to adhere to the compensation agreement or illegally modifies or terminates the agreement, the affected people can file a lawsuit against the authority (Article 12). That is, in the first three phases of land

⁵⁹ Anhuisheng renmin zhengfu fazhi bangongshi. 2010. "Tudi zhengshou xingzheng fuyi shiwu yanjiu" (Practical research on the administrative reconsideration of land expropriation), <http://www.chinalaw.gov.cn/article/xzfy/llyj/201006/20100600255126.shtml>. Accessed 1 September 2014; Zhong 2011.

expropriation, a right to directly sue the acquiring authority is provided for the affected people. Yet, it is still too early to see if these improvements in the new APL can really work in practice.

To sum up, measures that may secure fair, full and prompt compensation and resettlement for affected people do exist in law and especially in various central documents. However, they are too simple and dispersed, and the overall efficiency of expropriation is still the focus. As shown in Table 1, there is a big room for China to adopt this framework in the expropriation of collective land regarding the making and the implementation of the expropriation plan (the first three phases). The design of a four-phase participation framework also requires the reform of other related systems, including land use planning, disclosure of government information and the judicial system. As emphasized above, a well-governed expropriation procedure involves not only the planning and the implementation of the plan, but also the use of the expropriated land. It can be imagined that after the 29-year application of the current expropriation system since the 1986 LAL, large amount of collective land has been expropriated and transformed into state-owned construction land. A critical issue concerns whether those construction lands have been used efficiently or not.

4.4 Participation of farmers in monitoring the use of expropriated land

As stated by the Outline of an Overall National Land Use Plan (2006–2020), the area of idle land and the desired land that has been approved for expropriation but not yet supplied until 2009 is nearly 266,700 ha. This number increased to 937,500 ha by the end of September 2014,⁶⁰ which is more than seventh as big as the built area of Beijing. It also shows that the floor area ratio (FAR) of the land for industrial projects nationwide is only from 0.3 to 0.6, which signifies a low efficiency of land use.⁶¹ Nevertheless, the low use efficiency of expropriated land in practice does not mean that there is no regulation on it. In fact, two significant institutional systems have been established in terms of dealing with idle land. One focuses on the disposal of idle land; the other one concerns an *ex-post* supervision of the idle land, which is included in the State Land Supervision system created in 2006.

⁶⁰ Gjtdc.gov.cn. 2015. “Guojia tudi ducha gonggao (2015 No. 1)” (The announcement of the chief inspector of state land), 28 April, http://www.gjtddc.gov.cn/gggs/201504/t20150428_1349192.htm. Accessed 1 October 2014.

⁶¹ For an explanation of the FAR, see <http://www.carfree.com/far.html>.

First, in accordance with the 1998 LAL, no units or individuals are allowed to leave farmland unused or let it lie waste. Otherwise, certain charges have to be paid or the land has to be taken back. If the land is not used for two consecutive years, the original landholders are entitled to reacquire and use the land after it is taken back (Article 37). However, more restrictions are imposed on this right to reacquire the unused land in the new Measures for Disposal of Unused Land of the MLR in 2012. Firstly, the developer/the new land user is permitted to continue to use the expropriated land, even if the expropriation purpose is changed along with new plans (Article 8). Secondly, 20 percent of the transfer fee have to be paid to the government if the developer has not started development within one year after the land transfer. Or the idle land has to be taken back freely by the government, if the development has not been started for two years after the land is transferred (Article 14). Thirdly, the recovered idle land can be transferred to a new developer, or it can be added into the land reserve of local governments. Only if the farming condition is unspoiled and no recent construction projects can be arranged for the recovered land may the recovering agency entrust the former collective or individual farmers to resume farming (Article 19). It can be said that once the land has been expropriated, it is rather difficult for the original landholders to reacquire their land. This does not meet the requirements of the international framework, as shown in Table 1.

The second institutional system concerning the monitoring of land use is the State Land Supervision system, which focuses on an *ex-post* supervision over land use and administration of provincial governments. Based on the Measures on the Supervision of Farmland Conversion and Approval of Land Expropriation issued in 2008, the farmland conversion and expropriation projects approved by the State Council and provincial governments will be supervised by the state supervision agency. Although the punishment that the agency may impose on the government involved in violations of the approval power is quite limited, this system does play a role in inhabiting illegal land use, as stated by the Announcement of the Chief Inspector of State Land from 2007 to 2015.⁶² Meanwhile, through this series of announcements, the public becomes more familiar with the land supervision system and actually has been provided with a formal channel to help the supervision agency monitor the land use of local governments. For instance, among the seven illegal use of land disclosed in the No.2 Announcement in 2008, three of them were found based on tip-offs from local people. However, there is still no specific regulation on the supervision of the use of expropriated land by the public, including the affected people. In order to strengthen the effect of the

⁶² Available at: <http://www.gjtddc.gov.cn/gggs/>.

supervision of the State Land Supervision system, a draft for a Regulation on State Land Supervision is expected to be published in the near future.⁶³ If the role of the public in monitoring the land use, especially the use efficiency of expropriated land, can be confirmed in this coming Regulation, it will be a great step forward.

It is obvious that the participation of the public, including the affected people, in monitoring the use efficiency of expropriated land is emerging in China. However, it is not clearly recognized by a unified regulation. Together with the lack of participation in the first three phases of land expropriation, a full and effective participation in expropriation projects is not secured under the Chinese legal system.

5. The participation framework for the expropriation of houses on state-owned land

The discussion above primarily refers to the procedure for expropriating collective land, which is far from being satisfactory compared to the international framework. In accordance with the 2011 Regulations for Expropriation and Compensation for Houses on State-owned Land (the 2011 Expropriation Regulations) issued by the State Council, the regulations on expropriation of state-owned land is more mature than the collective land.⁶⁴ However, the adoption of this international framework can still help to improve the expropriation concerning state-owned land.

As shown in Table 1, certain elements of the international framework have been included in the 2011 Regulations, especially in terms of the list of public purposes and the social stability risk assessment (SSRA). Although there are no detailed rules on how to conduct this assessment in this regulation, several relevant documents have been issued by the NDRC since 2012.⁶⁵ Moreover, regulations regarding the SSRA in expropriations of private houses on state-owned land begin to appear in local areas, such as the Trial Opinion of Nantong City (Jiangsu Province) on the Implementation of SSRA in Land Expropriation Projects in 2010, the Measures of Huai'an City (Jiangsu Province) on the Implementation of SSRA in Land Expropriation Projects in 2012, and the Measures of Zibo City (Shandong Province) on SSRA in Land Expropriation in 2013. Nevertheless, compared with the SIA in India, the independence and accountability of the SSRA have to be strength-

⁶³ Li, Le. 2015. "Zhifa biao zhun hua tui jin du chu ya suo tan xing kong jian" (Standardization of law enforcement, land supervision can compress the "flexible" space), *Zhongguo jingyingbao*, 20 April.

⁶⁴ Chen, 2013.

⁶⁵ Ma 2013, 62–64.

ened, together with the participation of affected people.⁶⁶ The judicial protection provided by this Regulation and the new APL also contributes to the adoption of the international framework in expropriations concerning state-owned land.

In the meantime, two issues should be further considered by the Chinese legislature in future reforms of the expropriation of (houses on) state-owned land. One is the attempt of the acquiring authority to obtain the desired houses through voluntary purchase before starting an expropriation process. The other one concerns the right of the original landholders/house owners to reacquire their expropriated houses, if later the land use is changed for private use or the land is not needed due to the changes of land use plans. Moreover, this right to reacquire the expropriated houses should be secured by the judiciary. These issues should also be well considered in the design of the participation framework for the expropriation of rural collective land.

Table 1: Comparison between the international framework, the participation framework for the expropriation of collective land and the one for the expropriation of houses on state-owned land

	The international framework	Expropriation of collec- tive land	Expropriation of houses on state-owned land
(1) Participa- tion prior to the expro- priation de- cision	<p>1. Public purposes should be clearly enumerated in law</p> <p>2. In the case of an open-ended article, an SIA and/or a developed land use planning system should be available</p> <p>3. Even if it is for a public purpose, attempts to acquire the land through voluntary transactions should be tried by the authority</p> <p>4. If the voluntary purchase failed, power imbalances, provision of related information, people who can participate and forms of participation should be well considered</p> <p>5. Judicial review</p>	<p>1. Not listed</p> <p>2. No SIA; government-dominated planning</p> <p>3. No such attempts</p> <p>4. No effective participation; only one public hearing either in phase 1 or phase 2 (not compulsory)</p> <p>5. In the case of disagreements, may sue the authority directly (the new APL)</p>	<p>1. An inclusive list (Article 8)</p> <p>2. A SSRA has to be conducted; the expropriation shall comply with the socioeconomic development plan, overall land use plans, and the urban and rural plan (Article 9 and 12)</p> <p>3. No such attempts</p> <p>4. A public consultation for the proposed plan; and a public hearing if more than 50% of the affected people object to the plan (Article 10 and 11)</p> <p>5. Objections can be lodged through an administrative reconsideration or a lawsuit (Article 14 and the new APL)</p>

⁶⁶ Zhang 2014, 65–70.

	The international framework	Expropriation of collective land	Expropriation of houses on state-owned land
(2) Participation prior to the approval of compensation and resettlement plans	<ol style="list-style-type: none"> 1. Fair valuation and fair compensation (<u>market value</u>) 2. The affected party may hire their own valuers and <u>independent</u> valuation agencies 3. Be compensated with <u>alternative land</u> first 4. Judicial review 	<ol style="list-style-type: none"> 1. Not market value (based on original land use) 2. Only valued by the authorities 3. Yes 4. If disagree, may sue the authority directly (<u>the new APL</u>) 	<ol style="list-style-type: none"> 1. <u>Market price</u> of the acquired house (Article 19) 2. A property appraisal agency is selected through a <u>negotiation of affected people</u> (Article 20) 3. Compensation in money, <u>or another house with</u> an equivalent value (Article 21) 4. Objections can be lodged through an administrative reconsideration <u>or a lawsuit</u> (Article 26 and the new APL)
(3) Participation in the implementation of the expropriation plan	<ol style="list-style-type: none"> 1. Only after the <u>entire</u> compensation or a <u>substantial</u> part of it has been paid may the authority take possession of the land 2. Clear rules on the distribution of the compensation <u>between</u> landowners and actual land users 3. <u>Enough</u> time to vacate land or recoup his investment in land 4. Judicial review 	<ol style="list-style-type: none"> 1. Yes 2. No clear rules 3. No clear rules 4. May sue the acquiring authority if it breaks the compensation agreement (<u>the new APL</u>) 	<ol style="list-style-type: none"> 1. Yes (Article 27) 2. Only the house owner is entitled to be compensated 3. After the authority paid the compensation, the affected people <u>shall vacate their houses in time</u> (Article 27) 4. May sue the acquiring authority if it breaks the compensation agreement (<u>the new APL</u>)
(4) Participation in monitoring the use of the expropriated land	<ol style="list-style-type: none"> 1. A special monitoring agency 2. The affected party can help to supervise <u>if and how the expropriated land is used</u> 3. The original landholders should have <u>a right to reacquire the expropriated land</u> if the land is not needed due to changes of plans 4. Judicial review 	<ol style="list-style-type: none"> 1. The State Land Supervision agency 2. Emerging, but no clear channels 3. Rather difficult to reacquire the land 4. No judicial review 	<ol style="list-style-type: none"> 1. The upper-level government is responsible for supervising the acquiring authority (Article 6); the State Land Supervision agency 2. Any organizations or individuals may <u>report violations</u> to local governments or the acquiring authority (Article 7) 3. <u>No</u> rules on the right to reacquire the expropriated houses 4. No judicial review

6. Conclusion

Under the international governance structure for land expropriation, a right balance between a maximum efficiency and a maximum fairness is desired in a well-governed expropriation procedure. This paper focuses more on the fairness aspect of this procedure in China. Specifically, through establishing a four-phase participation framework based on relevant international documents, the land rights and interests of affected people can be secured without jeopardizing the public interest involved. A further question concerns if and how this international framework can be adopted in countries like China as an efficiency pursuer. Under the current legal framework, the lack of participation in expropriation, especially the expropriation of rural collective land, is evident. A transparent and highly participatory procedure for the expropriation of collective land is urgently needed in China. According to the pilot plan of the central government in the 33 counties and districts, a complete revision of the current collective land expropriation system will probably be carried out depending on the results of these local pilots. In my opinion, the four-phase participation framework proposed in this research, which covers the whole expropriation process, can be a helpful guide for the local pilots and later be adopted by the law.

Based on the 2011 Expropriation Regulations and the ongoing pilot concerning collective land, at least three aspects of the expropriation system of collective land can be improved. First, with the market transfer of certain collective construction land, the scope of land expropriation is expected to be reduced. Second, through requiring a compulsory SIA or SSRA before an expropriation decision is made, together with a list of public purposes, public interests can be better defined on the basis of well-protected private land rights. Third, according to the pilot plan, the compensation for land expropriation will rely on various factors, such as the use and the location of the expropriated land, the level of local economic development and the average income of local people, instead of the original use of the land. That is, the market value of the expropriated land may be used for calculating the final compensation in the near future. Meanwhile, the voluntary transaction of the desired land before the start of an expropriation and the right of the original landholders to reacquire the land, shall be established and judicially protected in future regulations or laws concerning the expropriation of both (houses on) state-owned land and collective land.

It is worth noting that the adoption and implementation of this international framework in China is closely related to and affected by other reforms. In particular, the availability and effect of judicial review throughout the whole expropriation process depends heavily on the result of the current judicial reform across China. Also, reforms in the local financial system determines if and how well this

framework will be implemented in practice to a large extent. Thus, a holistic plan of all the relevant reforms is desired.

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